Supreme Court, U.S.
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No. 95-232

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LLOYD HENDERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the 120-day service requirement of Federal Rule of Civil Procedure 4 supplants the forthwith service requirement found in the Suits in Admiralty Act ("SAA").

II. If the 120-day service requirement of Rule 4 does not supplant the forthwith service requirement found in the SAA, whether district courts may extend the time for service provided by the SAA under appropriate circumstances.

LIST OF PARTIES

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REPLY BRIEF FOR PETITIONER

ARGUMENT AND AUTHORITIES

I. THE 120 DAY SERVICE REQUIREMENT OF RULE 4 SUPPLANTS THE FORTHWITH SERVICE REQUIREMENT IN THE SAA.

A. Rule 4(j) Conflicts With The "Forthwith" Service Requirement In The SAA.

The United States argues that there is in fact no conflict between the SAA and Rule 4(j) and that effect can be given to both statutes. The United States contends that Rule 4(j) and Section 742 of the SAA are not in conflict because Rule 4(j) does not necessarily confer a right to an absolute 120 days in which to serve the complaint. (Br. for the United States at 18). The United States also argues that although the rules may produce differing results, this is not enough to establish that the statutes

are in conflict. *See Radzanower v. Touche, Ross & Company*, 426 U.S. 148, 155 (1976); *United States v. Batchelder*, 442 U.S. 114, 121 (1979). (Br. for the United States at 19-20).

Although Rule 4 allows 120 days for service, under the SAA, any time period greater than approximately 58 days is not "forthwith." (Br. for Petitioner at 34). Because courts have interpreted the term "forthwith" to allow only approximately half the time for service as allowed under Rule 4, the rules are inconsistent. The United States' argument also ignores the fact that Rule 4 allows an extension of time for service upon a showing of "good cause," while the "forthwith" requirement does not. In other words, under Rule 4, a court has the discretion to extend the time limit for service, while under the SAA, the court must dismiss the suit upon a finding that service was not "forthwith."

The United States also relies upon Supreme Court authority indicating that as long as the statutes are not repugnant, the Court must give effect to both. *See Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 1018 (1984); *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992); *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974).[1] (Br. for the United States at 17).

[1] None of the cases relied upon by Petitioner involves a conflict between a federal rule of procedure and a federal statute. These cases involve repeals by implication, in direct contrast to the present case which involves a federal rule promulgated pursuant to the Rules Enabling Act which expressly repealed all conflicting laws. *See, e.g., Penfield Co. v. Securities and Exchange Commission*, 330 U.S. 585, 589 n.5 (1947) ("where a Rule of Civil Procedure conflicts with a prior statute, the rule prevails"); *Griffith v. N.L.R.B.*, 545 F.2d 1194, 1197 n.4 (9th Cir. 1976) ("federal statutes are superseded by conflicting federal rules."); *American Federation of Musicians v. Stein*, 213 F.2d 679, 685- 686 (6th Cir. 1954) ("the Federal Rules of Civil Procedure have the force and effect of statutes, and if there is a conflict between procedure provided in an earlier Act of Congress and that provided by the rules, the former must yield to the latter").

However, this Court has held that a construction of a statute that produces incongruous results should not be accepted. *NLRB v. Lion Oil Co.*, 352 U.S. 282, 287 (1957); *United States v. Dow*, 357 U.S. 17, 25 (1958). Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). While a statuary waiver of sovereign immunity is to be strictly construed, congressional adoption of broad statutory language authorizing suits against the United States is not to be thwarted by an unduly restrictive interpretation. *Canadian Aviator Limited v. United States*, 324 U.S. 215, 222 (1945). Likewise, where an otherwise acceptable construction of a federal statute would raise serious constitutional problems, the United States Supreme Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. *New York v. United States*, 505 U.S. 144 (1992); *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993). Therefore, this Court should conclude that Rule 4 supplants the "forthwith" requirement in the SAA.

1. *The Provisions Of The SAA Negate An Unnecessarily Strict Interpretation Of The "Forthwith" Service Requirement.*

The United States argues that requiring "forthwith" service in admiralty cases is not inconsistent with the 120 day time limit in Rule 4. In other words, the government contends that it has an interest in expeditious service in admiralty litigation involving the government and it is not inconsistent with Rule 4 to require immediate service in certain cases. (Br. for the United States at 21). However, the "forthwith" requirement does not appear in any other statute involving a waiver of the government's sovereign immunity. *E.g.*, 28 U.S.C. §§ 1346(b), 2671-2680; (Br. for Petitioner at 26). In fact, similar statutes based upon the government's waiver of sovereign

immunity such as the Federal Tort Claims Act are governed by Rule 4. This claim is also inconsistent with the fact that seamen are considered "wards of admiralty." *See, Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 246 (1942).

Equally untenable is the United States' contention that the SAA does not provide for general uniformity of treatment of governmental and private defendants in admiralty litigation. (Br. for the United States at 23). In short, the United States claims that the SAA specifies different rules than applicable to private admiralty litigation in that suits under the SAA: (1) are subject to a shorter statute of limitations; (2) trial by jury is not permitted under the SAA; and (3) the statute provides for prejudgment interest at the rate of 4%. (Br. for the United States at 23-24). Although the government concedes that Section 743 of the SAA provides that such suits "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties," the government indicates that this provision only applies "to questions that the act does not specifically address." (Br. for the Government at 23).

First, section 743 does not, as the government asserts, specify that the provision only applies to matters the Act does not address. Second, the provisions of the SAA cited by the Government are primarily substantive provisions and do not involve matters of procedure. By enacting Rule 4 of the Federal Rules of Civil Procedure, Congress intended to create a "uniform and comprehensive method of service in all actions against the United States." H. Doc. 588, NOTES TO THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, 75th Cong., 3d Sess. (1938). In 1966, the federal rules, including Rule 4, were specifically applied to admiralty litigation. 112 CONG. REC. 4053 (1966); H. Doc. 391, 89th Cong., 2d Sess. (1966). Therefore, Congress intended the federal rules of procedure to supercede inconsistent statutory provisions governing service.

In fact, the Clarification Act of March 24, 1963, ch. 26, § 1, 57 Stat. 45, which the government discusses as providing an action for claims arising from employment in the crew of vessels owned by the United States through the Maritime Administration also supports Petitioner's claim. (Br. for the United States at 6-7). The statute provides that "officers and members of crews (hereinafter referred to as "seamen") employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to . . . death injuries, illness, maintenance and cure, loss of effects, detention or repatriation, . . . *have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels.*" (emphasis supplied). The language in this statute that seamen are to have "all the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States" further supports Petitioner's position that the legislature did not intend to create different rules of procedure governing seamen than private parties. This provision clearly establishes Congress's intent to place the government and private parties on equal terms.

The United States also tries to distinguish an opinion upon which Petitioner relies, *United States v. Isthmian S.S. Co.*, 359 U.S. 314, 324 (1959), in support of his claim that in enacting the SAA, Congress intended to treat seamen injured aboard government vessels and private litigants equally. (Br. for the United States at 24, n.22). The principle issue in that case was whether in an action brought under the SAA against the Government to recover costs incurred in transporting cargo, the government could file a cross-libel to recover on an unrelated debt owed by the claimant. The Supreme Court

concluded that the Government could not maintain their cross-libel within the same suit and was required to bring a separate action in a United States District Court. *Id.* at 324. The Court reasoned that Congress expressly declared that when sued under the Suits in Admiralty Act, the United States is to have its procedural rights determined and governed in the same manner as private parties. *Id.* at 324.

The Court later concluded that the district court improperly failed to award interest as provided in the SAA, and that Congress intended to cover interest awards affirmatively and not have them controlled by the general command that the suit "shall proceed and shall be heard and determined according to the principles of law" applicable to private parties. *Id.* The United States apparently takes the position that because this language in the SAA is inapplicable to allow other statutes to govern interest awards, this provision is also inapplicable to the "forthwith" requirement. However, an award of interest clearly involves a matter of substantive law and not procedure, which is the issue in this case. Furthermore, there is no comprehensive federal code or rules governing interest awards in all cases, in marked contrast to service of process which is governed by the federal rules of civil procedure at issue here. Consequently, this language of the SAA also supports the claims made by Petitioner in this case.

2. *Because The Federal Rules Of Procedure Were Not In Effect At The Time The SAA Was Enacted, The Service Provisions Of Rule 4 Are Controlling.*

The United States also argues that Petitioner's claim that the "forthwith" requirement was included in the SAA because no rules of procedure existed at that time is contradicted by the provision in Section 743 that SAA litigation "shall proceed and shall be heard and determined according to the principles of law and to the rules of

practice obtaining in like cases between private parties." (Br. for the United States at 25). In other words, the government asserts that by including the "forthwith" requirement, Congress created an exception to the rule that the time for service would be governed by the rules applicable to private parties. Again, the language in Section 743 supports Petitioner's claim because it indicates Congress's intent that suits against the Government should proceed in the same manner as suits between private parties. Clearly, without any rules of procedure in effect at the time the SAA was enacted, Congress had to provide some guidelines governing service on the Government.

In fact, the legislative history upon which the United States relies in its response support the claims raised by petitioner in this case. In its brief, the United States references a hearing in 1910 before the subcommittee of the Senate Judiciary Committee in which the "forthwith" requirement is briefly mentioned. (Br. for the United States at pp. 4-5 n.5); AMENDMENTS TO ADMIRALTY LAW: HEARINGS BEFORE THE SUBCOMMITTEE OF THE SENATE COMMITTEE ON THE JUDICIARY, 61st Cong., 2d Sess. 16 (1910). During that hearing Senator Brandegee inquires when service should occur. In response, Archibald G. Thacher, Procter In Admiralty, who appeared before the subcommittee replied, "I should say serve 'forthwith'. There is no reason why it should be not be done promptly after the filing of the libel." According to the government, the next version of the bill contained the requirement that the libel be served "forthwith" and there is no other legislative history discussing the term "forthwith." Although this discussion is cited by the United States, it supports Petitioner's position that at the time the SAA was enacted there were no rules of procedure governing service of process; consequently, this provision was included because otherwise there was no time limit for service of process.

The United States also argues that Petitioner's reliance on the 1937 Advisory Committee notes to Rule 4 is mis-

placed because the notes merely state that Rule 4 "provides a uniform and comprehensive *method* of service for all actions against the United States." (Br. for the United States at 19, n.18); H. Doc. 588, NOTES TO THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, 75th Cong., 3d Sess. (1938). The Government's conclusion that the term "method" does not include timing of service is incorrect, especially given the fact that Rule 4 included a requirement that service was to be made "forthwith" when the rules of procedure were adopted in 1938. H. Doc. 460, 75th Cong., 3d Sess. (1938). Although Petitioner states in his brief that the "method" of service on the United States under the SAA and Rule 4 are "essentially the same" (Petitioner's Br. at 10), the two statutes are different in that the SAA requires service by registered mail to the Attorney General of the United States, while Rule 4 allows service by registered or certified mail to the Attorney General of the United States. Even though these distinctions are not in issue in the present case, Petitioner does not concede that there is no conflict between the manner of service in these provisions.

The United States also attempts to distinguish the Third Circuit's decision in *Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62, 66 (3d Cir. 1985), on the grounds that the decision was merely dictum since the Third Circuit held that it lacked jurisdiction under the SAA and that jurisdiction existed only under the Federal Tort Claims Act. (Br. for the United States at 12 n.13). This is an incorrect interpretation of this opinion, since the sole issue in the case was whether in an admiralty suit against the United States under the SAA, Rule 4 supersedes the "forthwith" requirement of the SAA. 772 F.2d at 63. The court in *Jones & Laughlin Steel* noted in the case that it believed that because the plaintiff did not allege that a vessel of the United States caused its damage, the applicable statute was the FTCA. *Id.* at 65. However, because this argument was never raised, the Court addressed the merits of the district court's interpretation of the SAA. *Id.* The court precisely held that Rule 4 governs service in actions based on the FTCA and the SAA. *Id.* at 66. As in *Jones & Laughlin Steel*, this Court should find that the service provision of Rule 4 governs the service provision in the SAA.

B. The Application Of Rule 4(j) To The SAA Is In Harmony With The Rules Enabling Act And Rule 82 Of The Federal Rules Of Civil Procedure.

The United States argues that to construe Rule 4(j) as superseding the SAA's requirement of "forthwith" service would expand the jurisdiction of the district court in violation of the Rules Enabling Act, 28 U.S.C. § 2072, and Rule 82 of the Federal Rules of Civil Procedure. (Br. for the United States at 26). In support of this argument the government relies upon authority discussing that sovereign immunity is jurisdictional in nature and that statutes which waive immunity of the United States are to be strictly construed in favor of the sovereign. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *McMahon v. United States*, 342 U.S. 25, 27 (1951); *FDIC v. Meyer*, 114 S.Ct. 996, 1000 (1994).

However, in a precisely analogous case, the Supreme *Court in Mississippi Publishing Corporation v. Murphree*, 326 U.S. 438, 443 (1946), considered whether Rule 4(f) of the Rules of Civil Procedure which provided that process "may be served anywhere within the territorial limits of the state in which the district court is held" contravenes the provisions of the Rules Enabling Act which states that the rules "shall neither abridge, enlarge, or modify the substantive rights of any litigant," or Rule 82 which provides that the rules "shall not be construed to extend or limit the jurisdiction of the district courts. . . ." The court stated that Rule 4(f) and Rule 82 must be construed together, and that Rule 82 refers to venue and jurisdiction of the

subject matter of the district court, while Rule 4(f) concerns the means of bringing the defendant before the court which already has venue and jurisdiction of the subject matter. *Id.* at 444-445. The Court reasoned that Rule 4(f) does not enlarge or diminish the venue of the district court, or its power to decide the issues of the suit, which is jurisdiction of the subject matter to which Rule 82 must be taken to refer. "Rule 4(f) serves only to implement the jurisdiction over the subject matter which Congress has conferred, by providing a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained." *Id.* at 445. Therefore, the Court concluded that Rule 4(f) and Rule 82 were consistent. *Id.*

The Court also concluded that Rule 4(f) is consistent with the Rules Enabling Act. The Court reasoned that:

> Undoubtedly, most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. . . . The fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the district court . . . will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights. It relates merely to the manner and the means by which a right to recover . . . is enforced. In this sense the rule is a rule of procedure and not of substantive right, and is not subject to the prohibition of the Enabling Act. *Id.* at 446. (citations omitted).

As in *Murphree*, Rule 4(d) does not abridge any substantive rights and is consistent with the Rules Enabling Act and Rule 82.

II. THE FAILURE TO APPLY RULE 4 TO THE SAA RESTRICTS THE DISTRICT COURT'S POWER TO EXTEND THE TIME FOR SERVICE UPON A SHOWING OF GOOD CAUSE.

Finally, the United States criticizes the fact that the complaint in this case was filed in the Galveston Division of the Southern District of Texas rather than in the Houston Division. (Br. for the United States at 9). Suits under the SAA may be brought "in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found." 46 U.S.C. § 742. There is no dispute that the complaint in this case was filed in the Southern District of Texas where Petitioner resided. (App. 5). The statute does not require that the complaint be filed in a particular division of the district where the claimant resides. Additionally, this claim is raised for the first time in this Court.

Equally disingenious is the United States' challenge to Petitioner's method of obtaining the appropriate summons forms and complaint by mail and argument that Petitioner's failure to follow routine practice resulted in the lack of "forthwith" service. The United States asserts that Petitioner should have: (1) obtained summons forms and prepared the summons forms before the complaint was filed; and (2) filed the complaint by hand, thus facilitating immediate issuance and receipt of a signed, sealed summons. (Br. for the United States at 9-10, 30-31). However, there is nothing in the rules of procedure which prohibit a request for the appropriate forms by mail. The district court obviously concluded that diligence was exercised when it initially granted Petitioner an extension of time to serve the government. (App. 15). The record is also clear that it was the district clerk's delay in forwarding the appropriate forms which resulted in the delay in service. (App. 52, 59-67).

As discussed above, Petitioner believes that Rule 4 supplants the "forthwith" requirement of the SAA. Alternatively, Rule 4 of the Federal rules of civil procedure should be read in conjunction with the SAA so that the district court can determine whether service is "forthwith" based upon the standard in Rule 4. This Court's adoption of Rule 4 in cases involving the SAA would promote justice by allowing district courts to extend the time for service upon a showing of "good cause," such as existed in this case.

CONCLUSION

For the reasons set forth in this brief, the judgment of the court of appeals should be reversed and the case should be remanded to the district court for a trial on the merits.

Respectfully submitted,

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